LIBRARY
SUPREME COURT, U.S.

No. 73 - 920

FILED
DEC 12 19
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD GEORGE KERNS, *Petitioner,*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

THOMAS A. HUSER
FROST & JACOBS
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

JOHN A. LLOYD, JR.
JOHN A. WEST
Attorneys for Petitioner
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16
APPENDICES:	
A. Order of the United States Court of Appeals for the Sixth Circuit	1a
B. Memorandum Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division, dated June 9, 1973	2a
C. Temporary Restraining Order, United States District Court for the Northern District of Ohio, Eastern Division, dated April 25, 1973	10a
D. Order, United States District Court for the Northern District of Ohio, Eastern Division (Three-Judge Court), dated March 16, 1972	13a
E. Memorandum Opinion and Order, United States District Court for the Northern District of Ohio, Eastern Division (Three-Judge Court), dated December 3, 1971	14a

CASES CITED

Amalgamated Clothing Workers of America v. *Richman Bros.*, 348 U.S. 511 (1955)	10
Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970)	10
Gaffney v. *Cummings*, 412 U.S. 735 (1973)	15

Page

Mahan v. Howell, 410 U.S. 315 (1973) 14
Mitchum v. *Foster*, 407 U.S. 225 (1972) 11, 12, 13
NAACP v. *Button*, 371 U.S. 415 (1963) 15
Reynolds v. *Sims*, 377 U.S. 533 (1964) 14
Toucey v. *New York Life Ins. Co.*, 314 U.S. 118 (1941) 10
White v. *Regester*, 412 U.S. 755 (1973) 15
Younger v. *Harris*, 401 U.S. 37 (1971) 11, 12, 13

UNITED STATES CONSTITUTION CITED

First Amendment 2, 9, 14, 15
Fourteenth Amendment 5
Fifteenth Amendment 5

UNITED STATES STATUTES CITED

Act of March 2, 1793, § 6, 1 Stat. 335 10
28 U.S.C. § 2283 .....2, 9, 10, 11, 14
42 U.S.C. § 1983 .....12, 13

OHIO CONSTITUTION CITED

Article XI 5
Section 1 5
Section 6 3
Section 7 3
Section 8 3
Section 11 3
Section 13 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.———

LLOYD GEORGE KERNS, *Petitioner,*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered on November 9, 1973, which dismissed petitioner's appeal from a Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, entered June 11, 1973.

OPINIONS BELOW

Neither the order of the United States Court of Appeals for the Sixth Circuit nor the Memorandum Opinion and Order of the United States District Court for the Northern District of Ohio are reported. Both are reprinted in the appendix to this petition at pages 1a and 2a, respectively.

JURISDICTION

The order of the court of appeals was entered on November 9, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with the First Amendment, the federal Anti-Injunction Statute, and settled principles of federalism and comity, a federal district judge can forever enjoin a state supreme court from adjudicating state constitutional challenges to a state legislative reapportionment plan, when those challenges have not been, and will not be, adjudicated by any other court?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

"Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people . . . to petition the Government for a redress of grievances."

STATUTES INVOLVED

The Anti-Injunction Statute, 28 U.S.C. §2283:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

This petition arises out of an order of the United States District Court for the Northern District of Ohio, Eastern Division (Battisti, J.), which permanently enjoins petitioner and all other Ohio voters from litigating in any court the validity under the Ohio Constitution of the 1971 Ohio state legislative reapportionment plan. This extraordinary order, which has prevented petitioner from continuing litigation that he brought in the Ohio Supreme Court to review the Ohio constitutionality of the 1971 reapportionment plan, arose out of the following circumstances:

On March 30, 1973, petitioner filed an action in the Ohio Supreme Court styled *Kerns* v. *Gilligan, et al.*, (Case No. 73-270), which alleged that the 1971 reapportionment plan violated the Ohio Constitution in numerous, material respects.[1] The action was filed pursuant to Article XI of the Ohio Constitution, Section 13, which grants the Ohio Supreme Court "exclusive, original jurisdiction" of an action challenging the state constitutionality of a legislative reapportionment plan.

[1] The principal state constitutional claims that were made in the *Kerns* complaint were (1) the plan uses precincts instead of political subdivisions and city wards in creating many legislative districts, contrary to Article XI, §§ 6, 7(B) of the Ohio Constitution; (2) the plan violates the constitutional requirement in Article XI, § 7(A) of compactness of legislative districts for numerous house and senate districts; (3) the plan fails in several instances to place the excess population above the number of whole districts within a county in one adjoining district, contrary to Article XI, § 8; (4) the plan radically changes the previous boundaries of legislative districts, contrary to Article XI, § 7(D); (5) the plan fails to create whole districts within a county in numerous instances, contrary to Article XI, §§ 8, 11.

Shortly thereafter respondents obtained an *ex parte* temporary restraining order from District Judge Frank J. Battisti which specifically ordered petitioner to "withdraw, dismiss and terminate" his action. (App. 11a). In compliance with this order, petitioner dismissed his action in the Ohio Supreme Court.

Thereafter, on June 11, 1973, the temporary restraining order was made permanent by Judge Battisti's Memorandum Opinion and Order, which forever restrains petitioner and all other Ohio voters from attempting to litigate any issue concerning the validity of the 1971 reapportionment plan or, indeed, from undertaking any legal action which would have the effect of impeding any election that might be held under that plan, whether or not such action were concerned with reapportionment issues.[2]

---

[2] The pertinent part of Judge Battisti's injunction provides:

> [A]ll parties to, and class members in, Civil Action No. C71-1130 are hereby permanently restrained and enjoined from litigating any matters which were, or could have been, raised in Civil Action No. C71-1130, in any state or federal court . . . and further that all such persons are permanently restrained and enjoined from filing any new actions affecting any matters which were, or could have been, raised herein and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court; and all such persons are permanently restrained and enjoined from taking any legal action . . . designed to or which will have the effect of impeding or interfering with the carrying out of any election pursuant to the plan of apportionment approved and adopted by the orders of this Court entered December 22, 1971, and March 13, 1972. Furthermore, the defendant Ted W. Brown, as Secretary of State . . . [is] hereby ordered and directed to accept filings and conduct elections only in accordance with the provisions of the March 13, 1972 order of this Court adopting a legislative plan of apportionment so long as it remains in effect, or in conformity with the election statutes of the State of Ohio which are not inconsistent therewith. (App. 8a-9a).

This broad injunction was justified by the district court solely on the ground that it was necessary to protect the judgment of a three-judge district court previously rendered in *Jordon* v. *Mahoning County Board of Elections, et al.,* Northern District of Ohio, Eastern Division (Case No. C71-1130). (App. 13a). That case was filed on November 15, 1971, as a class action on behalf of all qualified voters in Ohio and challenged the validity of the 1971 reapportionment plan on federal and state constitutional grounds.[3]

On December 3, 1971, after counsel for both plaintiff and defendants in the *Jordon* case stipulated that the reapportionment plan was obviously deficient because of its exclusion of certain geographic areas of the state from any legislative representation, the three-judge court ordered that the plan be resubmitted to the apportioning persons in Ohio[4] for the adoption of a "constitutionally sound" plan. At the same time the court enjoined all members of the class (defined as "all registered voters in Ohio") from "litigating any issues raised [by the complaint] in any other court during the pendency of [the] action."

---

[3] The *Jordon* complaint challenged the reapportionment plan on four general grounds (1) failure to comply with the one-man, one-vote standard as required by judicial construction of the Fourteenth Amendment to the United States Constitution; (2) failure to comply in numerous, material respects with the express provisions of Article XI of the Ohio Constitution; (3) failure to include certain geographic areas of Ohio in the plan; and (4) gerrymandering along racial and ethnic lines in violation of the Fourteenth and Fifteenth Amendments of the United States Constitution.

[4] The persons responsible for legislative reapportionment in Ohio are designated in Article XI, Section 1, of the Ohio Constitution.

Pursuant to the order of the three-judge court, the apportioning persons reconvened on December 20, 1971, and adopted by a three-to-two vote an amended version of the original reapportionment plan, which did nothing more than incorporate the geographic areas that had been omitted from the original plan. No attempt was made to correct the many other infirmities under the Ohio Constitution which were, and still are, inherent in the plan.

On December 22, 1971, a hearing was held before the three-judge court on the amended reapportionment plan. In the course of that hearing, all three judges on the panel made it clear that the court was going to consider and rule upon only the federal constitutionality of the plan under the one-man, one-vote standard. For example, in a dialogue with one of the attorneys for the plaintiff, Judge Celebrezze, the senior and presiding judge, stated:

> MR. JONES:
>
> . . .
>
> We do continue to have questions about the gerrymandering allegations, both political and racial, and the allegations of lack of compactness.
>
> JUDGE CELEBREZZE:
>
> Is that question proper before this Court? Isn't the function of this Court in this particular litigation to determine whether or not the one-man, one-vote rule has been followed?
>
> MR. JONES:
>
> Well, these all are related, your Honor. The matter of compactness, the matter of the districts being contiguous, these are all elements of the constitutionality of the plan.

JUDGE CELEBREZZE:

There may be a discrepancy between the Constitution of Ohio and the Federal Constitution. The Federal Constitution merely imposes on this Court the duty to determine whether or not the one-man, one-vote rule under Sims v. Reynolds has been complied with. That is the question. (Transcript of Proceedings, pp. 56-57) (Emphasis added).[5]

The court's Memorandum Opinion and Order entered on December 22, 1971, immediately after the conclusion of the three-judge court hearing, confirms the intention of that court not to pass on the claims that the plan was unconstitutional under the Ohio Constitution:

> On consideration of the evidence thus far in the case, the Court concludes that the Board of Apportionment, using the best available 1970 official census or census related data, has made a good faith effort to apply the one-man, one-vote doctrine in devising a plan for redistricting the General Assembly of the State of Ohio, and that the plan as presented to the Court on December 21,

---

[5] In addition to Judge Celebrezze's remarks, Judge Walinski made it clear that the state constitutional claims in the *Jordon* case could be raised in a state court:

> JUDGE WALINSKI: This case was filed in the Federal Court out of Mahoning County. Is there any reason that you feel that you could not get adequate remedy from the State Courts on the question of gerrymandering or racial imbalance, and so on? (Transcript of Proceedings, p. 60).

Judge Battisti concurred in this view:

> JUDGE BATTISTI: Well, of course, if you have got a constitutional question that hasn't been resolved before us, you may take it to the Supreme Court; we are not going to entertain it again . . . . (Transcript of Proceedings, p. 66).

1971, insofar as practicable, meets the one-man, one-vote standard required by the Constitution of the United States.

Therefore, it is concluded that the plan as presented to this Court meets the one-man, one-vote standard required by the Constitution of the United States.... (App. 14a) (Emphasis added).

On March 13, 1972, the three-judge court entered final judgment "adopting" the plan and relinquished jurisdiction of the case. Thereafter, appeals were taken to this Court by various Ohio voters, who, although members of the class, had been denied the right to intervene or otherwise be heard by the three-judge court. Those appeals were dismissed for want of jurisdiction,[6] as were others later taken to the United States Court of Appeals for the Sixth Circuit. No appeals were taken to this Court or to the court of appeals by any of the named parties to the *Jordon* action.

Thereafter, petitioner commenced the action in the Ohio Supreme Court, which led to the issuance of the temporary restraining order and injunction now under review.

* * *

Immediately after the district court's June 11, 1973, injunction order, petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. On November 9 the Sixth Circuit dismissed that appeal without hearing oral argument. (App. 1a). Petitioner's contentions in the Sixth Circuit, that Judge Battisti's injunction against any state court litigation of the 1971 plan's validity under the Ohio Constitution was inconsistent with the Anti-Injunction

[6] October Term, 1971, No. 71-1439.

Statute (28 U.S.C. § 2283) and settled principles of comity and federalism, were thus left completely unresolved.

Thus, by virtue of the district court's termination of petitioner's action in the Ohio Supreme Court and the ensuing permanent injunction, unless a writ of certiorari is granted, the Ohio Supreme Court will never be permitted to pass upon the substantial claims that the 1971 reapportionment plan does not comport with the Ohio Constitution. Indeed, that court will have been forever divested of jurisdiction, made exclusive by the Ohio Constitution, to decide this issue of paramount state concern, without even being advised of the reason for such divestiture.

REASONS FOR GRANTING THE WRIT

The district court's injunction, which forever restrains the Ohio Supreme Court from exercising its original jurisdiction to determine the constitutionality under the Ohio Constitution of the 1971 Ohio legislative reapportionment plan, violates the federal Anti-Injunction Statute, 28 U.S.C. §2283, ignores recent decisions of this Court which articulate the comity owed to state courts by federal judges, disregards the repeated declarations of this Court that state concerns should be carefully considered in a reapportionment case, and constitutes a direct abridgment of petitioner's First Amendment rights. Accordingly, this case involves a striking abuse of a federal district judge's equity powers which should be corrected by this Court.

I

It has been the law of the land since 1793 that a federal court's authority to enjoin state court pro-

ceedings can be exercised in only the most compelling and limited circumstances.[7] The current codification of this basic principle, the Anti-Injunction Statute, 28 U.S.C. §2283, provides that a federal court may enjoin state court proceedings only where "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

In applying this statutory limitation on the power of the federal judiciary, this Court has repeatedly ruled that these statutory terms must be given their plain meaning and that the narrow exceptions set forth in the statute "should not be enlarged by loose statutory construction." *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 287 (1970). More importantly, this Court has recognized that anything other than a strict interpretation of the statute would be incompatible with our federal system of government:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion. 398 U.S. at 297.

See also *Amalgamated Clothing Workers of America* v. *Richman Bros.,* 348 U.S. 511 (1955). *Cf. Toucey* v. *New York Life Ins. Co.,* 314 U.S 118 (1941).

Judge Battisti's justification for enjoining petitioner's Ohio litigation fails to satisfy these strict stand-

---

[7] See Act of March 2, 1793, § 6, 1 Stat. 335.

ards. The injunction rests solely on the alleged necessity to protect the prior judgment of a three-judge district court which had held only that the 1971 reapportionment plan complied with the one-man, one-vote requirement. But even if a single district court judge can issue an injunction "to protect or effectuate" judgments of a three-judge district court, the substantive inappropriateness of the injunction in this case is manifest.

As disclosed by the orders of the three-judge court and the remarks of all three judges during oral argument, that court did not render any judgment on the Ohio constitutional issues which qualifies for protection under the exception in §2283. The judgment of the three-judge court was simply that the 1971 plan was consistent with the one-man, one-vote standard. Since there are alternate reapportionment plans which conform with the Ohio Constitution without offending the one-man, one-vote standard, petitioner's action in the Ohio Supreme Court did not represent a threat to the three-judge court's judgment.

II

Even if the Anti-Injunction Statute were not an absolute bar to the issuance of Judge Battisti's injunction, this Court should nevertheless strike down that injunction as a flagrant abuse of discretion inconsistent with long-standing principles which govern the relationship between the federal government and the several states. *Younger* v. *Harris,* 401 U.S. 37 (1971); *Mitchum* v. *Foster,* 407 U.S. 225 (1972).

Speaking for the Court in *Younger,* which struck down a federal injunction against a state court prosecution, Justice Black set forth with his characteristic

clarity the basic principles of comity that mandate respect by a federal court for a state's judiciary:

> [C]omity . . . is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism" and one familiar with the debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." 401 U.S. at 43.

Thus, *Younger* v. *Harris* represents a ringing affirmation of the principles of comity which, even apart from the Anti-Injunction Statute, compel the greatest deference by federal judges who are asked to intrude upon state court proceedings. Those principles were clearly transgressed by the broad and preemptive injunction entered by Judge Battisti in this case.[8]

In *Mitchum* v. *Foster,* involving a federal injunction against a state civil proceeding, the Court held that 42 U.S.C. §1983 was an Act of Congress within the

---

[8] Mr. Justice Stewart's concurring opinion in *Younger* recognized that the Court did not there have before it a case involving a federal injunction against a state civil proceeding, such as the one involved in this case. 401 U.S. at 55. However, his suggestion that "the offense to state interests [arising out of a federal injunction] is likely to be less in a civil proceeding" than in a criminal proceeding, 401 U.S. at 55 n. 2, is plainly inapplicable in a reapportionment case where the state's interest goes to the very integrity of the state's legislative and electoral processes.

meaning of the "expressly authorized" exception in the Anti-Injunction Statute. Thus, the case was remanded to a three-judge district court for a determination whether an injunction was proper in view of:

> the principles of equity, comity and federalism . . . [which] must restrain a federal court when asked to enjoin a state court proceeding. 407 U.S. at 243.

While the *Mitchum* opinion does not delineate the specific standards that a federal court must use when asked to enjoin state civil proceedings, the opinion in no way sanctions such an injunction under anything other than the "exceptional circumstances" described in *Younger* v. *Harris:*

> . . . where irreparable injury is "both great and immediate," . . . where the state law is "flagrantly and patently violative of expressed constitutional prohibitions" . . . or where there is a showing of "bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief." 407 U.S. at 230.

It cannot be plausibly maintained that petitioner's action in the Ohio Supreme Court, an action by a single citizen against Ohio's Governor and other public officials, qualifies for abatement under these standards.[9] No threat to federal rights or federal interests

---

[9] Additionally, the court in *Mitchum* relied upon "the very purpose of § 1983 . . . to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . . ." 407 U.S. at 242. This justification for allowing federal injunctions of state court proceedings in § 1983 cases does not permit an injunction against a citizen seeking recourse for the state government's violation of the state's constitution.

was involved in that action. All petitioner seeks is a reapportionment plan that passes muster under both the federal and state constitutions. This Court has consistently recognized the right of a state to achieve this end.

III

We have shown in Parts I and II above that the Anti-Injunction Statute and principles of comity and federalism condemn Judge Battisti's order. There are additional considerations which reinforce that conclusion and which further justify the invocation of this Court's certiorari jurisdiction. For the injunction entered by the district court both compels Ohio citizens to accept a reapportionment plan which is inconsistent with important Ohio constitutional requirements, and abridges directly the exercise by petitioner and his fellow citizens of their rights under the First Amendment.

One of the principal challenges to the 1971 plan is that it does not maintain the integrity of internal political subdivision lines, contrary to the clear mandate of the Ohio Constitution. In addition, contrary to another explicit constitutional provision, the plan uses precincts instead of political subdivisions and city wards in creating many legislative districts. Whatever may have been the practice of some lower federal courts under *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this Court last term in *Mahan* v. *Howell,* 410 U.S. 315 (1973), squarely held that the pursuit of perfect mathematical equality could not justify the disregard of a state's interest in having legislative districts which correspond to internal political subdivisions.

See also *Gaffney* v. *Cummings*, 412 U.S. 735 (1973); *White* v. *Regester*, 412 U.S. 755 (1973). Thus, Judge Battisti's injunction prevents the effectuation of Ohio constitutional provisions which express the same state interests this Court has recognized to be valid.

In addition to the foregoing reasons for granting certiorari, Judge Battisti's injunction order violated petitoner's First Amendment rights under the doctrine recognzed in *NAACP* v. *Button*, 371 U.S. 415 (1963). Clearly petitioner's action in the Ohio Supreme Court "was not a technique of resolving private differences," but rather was "a form of political expression" designed "to achieve legitimate political ends," and thus was protected by the First Amendment. 371 U.S. at 429-30. Accordingly, such activity can be restricted only by the most narrowly drawn court order, and then only if such an order were justified by a compelling governmental interest. 371 U.S. at 435-36, 438. Judge Battisti's injunction, being drawn in the broadest terms imaginable and not being necessary to vindicate any defensible federal interest, satisfies neither of these conditions.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN A. LLOYD, JR.

JOHN A. WEST
Attorneys for Petitioner
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

THOMAS A. HUSER
FROST & JACOBS
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-1072

SAMUEL J. JOHNSON
Plaintiff-Appellee

v.

LLOYD GEORGE KEKIS
Appellant

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants-Appellees

Order

APPENDIX

(F

Before: PECK, MILLER and LIVELY, *Circuit Judges*.

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the premises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

It Is Ordered that this appeal be and it hereby is dismissed. It is further Ordered that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT
/s/ JAMES H. HIGGINS
Clerk

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John A. Lloyd, Jr.

John A. West
Attorneys for Petitioner
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

Of Counsel:

E. Edward Bruce
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Thomas A. Hogan
Frost & Jacobs
2900 DuBois Tower
511 Walnut Street
Cincinnati, Ohio 45202

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1972

SAMUEL J. JORDON
Plaintiff-Appellee

v.

LLOYD GEORGE KERNS
Appellant

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants-Appellees

Order

(Filed Nov. 9, 1973)

Before: PECK, MILLER and LIVELY, *Circuit Judges.*

This cause having come on to be considered on the motion of certain of the defendants-appellees to dismiss the appeal, and the Court being fully advised in the premises having concluded for the reasons set forth in the Memorandum Opinion and Order filed by Chief Judge Frank J. Battisti that it is manifest that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (Rule 8, Rules of the Sixth Circuit), and that therefore the said Motion to Dismiss is well taken,

IT IS ORDERED that this appeal be and it hereby is dismissed. It is further ORDERED that the motion of the appellant for an expedited appeal be and it hereby is denied as moot.

ENTERED BY ORDER OF THE COURT
/s/ JAMES H. HIGGINS
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130

SAMUEL J. JORDAN, ET AL.,
Plaintiffs

v.

MAHONING COUNTY BOARD OF ELECTIONS, ET AL.,
Defendants

Memorandum Opinion and Order

(Filed June 9, 1973)

Battisti, C. J.

Plaintiffs have requested supplemental orders to protect the judgment already rendered in this case. Specifically, plaintiffs request that all persons included in the plaintiffs' class action be enjoined from relitigating the issues already decided, since it is nothing less than a frivolous effort to prevent this case from ever reaching a final resolution. The relief sought is clearly within the equitable jurisdiction of the Court to effectuate its judgments. *Dugas* v. *American Surety Co.*, 300 U.S. 414, 428-29 (1937); *Root* v. *Woolworth*, 150 U.S. 401, 411-12 (1893); *Hamilton* v. *Nakai*, 452 F.2d 152, 157 (9th Cir. 1972). Therefore, an appropriate injunction is set forth at the conclusion of this opinion.

The relevant facts of this case are clear from the record. On November 15, 1971, a complaint was filed challenging the apportionment plan then in effect for the election of members of the Ohio General Assembly. On November 30, 1971, an order determining the class which plaintiff represented was signed. The state apportionment board was then ordered to submit a new plan no later than December

21, 1971. This was done, and plaintiff filed no objection to the new plan. Final judgment approving this plan was subsequently entered on March 13, 1972.

The respondent herein, Lloyd George Kerns, now contends that he was not within the boundaries defined by the order of class determination and, thus, should not be considered bound by the final judgment. It must be noted at the outset that Mr. Kerns is at best stressing a technicality, for nowhere in his memoranda does he allege lack of notice that this lawsuit was pending. On the contrary, the only inference to be drawn from the facts presented is that he knew of the proceedings throughout [1] and may have actually participated therein. Any attempt by respondent to negate this inference would indeed strain credulity. He is a former state legislator and remains quite active in politics. In fact, his former lawyer, who participated throughout this lawsuit and is a partner of his current lawyer, testified that his political party had solicited respondent for

---

[1] It should be noted in this regard that since this class action was not brought pursuant to F.R.Civ.P. 23(b)(3), it is not subject to the individual notice requirement and "opt-out" provision of Rule 23(c). Rather, it sought equitable relief to redistrict the state in accordance with constitutional requirements. Such relief clearly falls within the terms of Rule 23(b)(1) and (2), and personalized notice directed to individual class members is not strictly required in all such cases. *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Johnson* v. *City of Baton Rouge*, 50 FRD 295 (D. La. 1970). The notice to be utilized under these circumstances is within the sound discretion of the Court, and mere notice by publication will usually suffice. *Lopez* v. *Wyman*, 329 F.Supp. 483, aff'd., 404 US 1055 (1972). In the class determination order, judicial notice was taken of the fact that the redistricting issue had already received widespread publicity in the news media throughout the state. Additional notice was entirely unnecessary. For this reason, Mr. Kerns cannot sustain a contention that binding him by the prior proceedings is violative of Due Process for lack of adequate notice, even were he to allege an absence of actual notice, see *Lopez* v. *Wyman, supra*, at 486, which, as noted above, he does not.

the express purpose of continuing the litigation. Furthermore, respondent filed notices of appeal of January 3 and 24, 1972, which would make it impossible for him to seriously contend that he first learned of this action after the final judgment binding all qualified voters was issued on March 13, 1972.

Therefore, the Court will proceed to analyze the technicality which is the essence of Mr. Kerns' argument. He points to the fact that the class determination order referred only to "registered voters," a group to which he does not belong. Rather, he is a "qualified voter," a term applied to those persons eligible to vote without registration under special statutory provisions applicable only to residents of municipalities of less than sixteen thousand people. Section 3503.06 O.R.C. Thus, respondent asserts, the judgment cannot be construed as broadening the class determination order, even though it incorporates language [2] to include all qualified voters, for such a determination would violate his right to Due Process by depriving him of his day in court. Under the facts of this case, this argument is so totally lacking in substance that it casts some doubt on the sincerity of counsel, who is a skillful and learned practitioner in federal court.

Respondent's argument depends entirely upon his overly restrictive interpretation of Rule 23(c)(1).[3] He reads this rule to require that amendments to class determination orders must *always* be made prior to judgment; and, although apparently conceding that he is within the literal language of the judgment, respondent contends that such inclusion is in effect an amendment to the class determination order and, therefore, a violation of Rule 23(c)(1). This

---

[2] This language was incorporated from a stipulation to which Mr. Kerns was not a party.

[3] That rule provides in pertinent part: "An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

interpretation, however, fails to take into account the applicable provisions of Rule 60(a).[4]

It is undisputed, as outlined above, that the class determination order referred only to "registered voters," although the complaint recites that the action was brought "... on behalf of all persons throughout the State of Ohio qualified to vote for candidates for membership in the Ohio General Assembly," and the final judgment was made applicable to the latter group. No reason was given by the Court for distinguishing between registered and qualified voters when the class determination order was signed, nor does respondent allege now that any valid reason existed for making such a distinction. Clearly, the interest of these two groups is identical—namely, to effectuate the "one-man, one-vote" principle set forth in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). As such, the omission of either group from any order herein would of necessity be inadvertent, and not indicative of the true intention of the Court[5] as understood by the parties. It would, therefore, be correctable *at any time* by an amendment pursuant to Rule 60(a).

---

[4] This rule provides that: "Clerical mistakes in judgments, orders or other parts of the record and *errors therein arising from oversight or omission may be corrected by the court at any time*. . . ." (Emphasis added.) For a discussion of the meaning of this language, see 6A Moore's Federal Practice at 4065-66; 3 Barron and Holtzoff, Federal Practice and Procedure, § 1324, pp. 398-99 (Wright ed. 1958).

[5] In paragraph 4 of respondent's Second Memorandum in these supplemental proceedings, he admits that the Court was probably operating under a mistaken belief as to the actual scope of the class determination order. He further states that this mistake persisted as late as April 11, 1972, after final judgment, when the Court denied Mr. Kerns' motion for clarification. This argument confirms, rather than negates, the propriety of applying Rule 60(a) to the erroneous order, as will be discussed later in this opinion.

As was stated in *Matthies* v. *Railroad Retirement Board*, 341 F.2d 243 (8th Cir. 1965) at 248:

> "All courts have the inherent power to enter orders *nunc pro tunc* to show that a thing was done at one time which ought to have been shown at that time. It is an entry now for something previously done so that the record may actually speak the truth."

There can be little doubt from the record and subject matter of this case as to the intended scope of the class. Thus, to amend the class determination order herein would be merely to "recognize only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending. No prejudice could possibly result from what the court did." *Pattiz* v. *Schwartz*, 386 F.2d 300 (8th Cir. 1968) (Blackmun, J.). Accordingly, to correct a technical imperfection in the record, the class determination order signed on November 30, 1971, is hereby amended by deleting the words "all registered voters of the State of Ohio" and inserting in their place the following:

> "All persons throughout the State of Ohio who are qualified to vote for candidates for membership in the Ohio General Assembly."

In making the modification to correlate the class determination order with the final judgment, the Court emphasizes that respondent has made no attempt to show that the correction will be prejudicial to him in any way. As noted previously, he appears to have participated substantially in the initial proceedings. This participation includes an appeal of the decision of the three-judge court to the Supreme Court, and even to the Sixth Circuit Court of Appeals, all before the entry of final judgment. Furthermore, it would seem that a claim of prejudice, to be sustained, would require at a minimum a showing that:

1. The aggrieved party's interest was different from the putative class representative, or

2. The representation of the class in the initial proceeding was inadequate.[6]

With respect to these elements, respondent Kerns does not even allege that his interest was different from the representative plaintiff. In fact, in the briefs he filed in the Supreme Court and the Court of Appeals, he alleged that his interests were "identical with those of members of the class represented by the plaintiff above named. . . ." Mr. Kerns did, however, in an amended notice of appeal assert that he believed the representation of the class to be inadequate. He did not specify any basis for his belief. However, it may be inferred from his memoranda filed in these supplemental proceedings that his dissatisfaction resulted only from the political makeup of the apportioned districts, and not from a violation of any cognizable constitutional right. He does not dispute that the original apportionment was unconstitutional[7] or that the final plan accepted by plaintiff satisfied constitutional mandates. Thus, his assertion as to the adequacy of representation does not even rise to the level of a colorable claim.

It is, therefore, clear that respondent's argument under the facts of this case amounts to an exercise in frivolity, or at best to a hypothetical question as to whether one may ever contest a modification of class boundaries which is made either simultaneously with, or subsequent to, the entry of judgment in this type of class action. While this might prove to be an interesting subject for general discussion, it requires no further response in this case. Since respondent is properly a member of the class in case number C71-1130, he is bound by the judgment in that action.

---

[6] These elements would also have to be shown as a prerequisite for respondent's claim that inadequate time was permitted in which to file objections to the class determination order.

[7] This approach would have been somewhat difficult, since the unconstitutionality of the original plan was conceded at the outset by all, including counsel for the State of Ohio.

To summarize, counsel for respondent has asked this Court to hold that the inclusion of Mr. Kerns in the final class judgment amounts to a violation of his Due Process rights. This request is made without a demonstration that such inclusion would be prejudicial, due to either a lack of appropriate notice, an inadequacy of representation, or a dissimilarity of interests between respondent and the plaintiff in the initial proceeding. Clearly, what we have here is an effort, and a rather shabby one at that, to utilize a solicited plaintiff to reopen a case already litigated, decided, and appealed. Such activity cannot be too strongly condemned. These subsequent proceedings are not a legitimate attempt to vindicate basic rights, as counsel would have us believe, but rather to use the Court as a political forum. Needless to say, such conduct borders dangerously on the realms of misrepresentation and contempt. The Court, however, unlike Mr. Kerns, is not inclined to further prolong a case which should have ended long ago. Thus, an injunction against further proceedings will be the only action taken at this time.

Accordingly, all parties to, and class members in, Civil Action No. C-71-1130 are hereby permanently restrained and enjoined from litigating any matters which were, or could have been, raised in Civil Action No. C 71-1130, in any state or federal court (except as may be provided by law for the appeal of any order in Civil Action No. C 71-1130 to the United States Court of Appeals or to the United States Supreme Court), and further that all such persons are permanently restrained and enjoined from filing any new actions affecting any matters which were, or could have been, raised herein and otherwise from taking any actions designed to or which will have the effect of interfering with the carrying out of the orders of this Court; and all such persons are permanently restrained and enjoined from taking any legal action (except as may be provided by law for the appeal of any order of this Court in Civil Action No. C 71-1130 to the United States Court of Appeals or to

the United States Supreme Court) designed to or which will have the effect of impeding or interfering with the carrying out of any election pursuant to the plan of apportionment approved and adopted by the orders of this Court entered December 22, 1971, and March 13, 1972. Furthermore, the defendant Ted W. Brown, as Secretary of State and chief election officer of the State of Ohio, his successor or successors, and all those acting by and under his authority, are hereby ordered and directed to accept filings and conduct elections only in accordance with the provisions of the March 13, 1972, order of this Court adopting a legislative plan of apportionment so long as it remains in effect or in conformity with the election statutes of the State of Ohio which are not inconsistent therewith. The said Secretary of State, his successor or successors, and all those acting by and under his authority are enjoined from accepting filings or declaring the results of any election, otherwise than in conformity with this order.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C71-1130

(Filed Apr. 25, 1973)

Temporary Restraining Order

This cause came on to be heard on motion of the Apportioning Persons of the State of Ohio for a Supplemental Order in this cause, to-wit: a temporary restraining order pursuant to Rule 65(b), Federal Rules of Civil Procedure, and upon the affidavit of James A. Laurenson, attached thereto, and the Court being satisfied that all parties received sufficient notification, and having heard counsel for the moving parties and the respondent, this Court finds:

That the Complaint in Civil Action No. C71-1130 challenged the original reapportionment plan as defective under both the state *and* federal constitutions, and prayed for injunctions requiring the movants to establish a plan that satisfied the requirements of the state *and* federal constitutions; that on December 3, 1971, this Court ordered the movants to establish a constitutionally sound plan, noting, as grounds therefor, state and federal constitutional defects in the original one; that this Court, on December 21, 1971, held Messrs. Norris and McElrory in contempt of its December 3, 1971 Order for attempting to litigate almost the identical issues raised in Case No. 73-270 in an original action brought by them in the Supreme Court of Ohio, and stated that "that case raised issues under advisement by the three-judge court;" that on December 22, 1971, this Court adopted the movants' revised plan for the 1972 election, but allowed 60 days for the filing of any state or federal constitutional objections, providing all parties ade-

quate opportunity to raise any state *or* federal constitutional challenges; that no objections were filed and this Court entered a Final Order on March 13, 1972, adopting the plan for the remainder of the decennium; that the Complaint in Case No. 73-270 raises similar issues to the Complaint filed in the Ohio Supreme Court in 1971, *i.e.*, that the plan violates the state *and* federal constitutions; that the Complaint in Case No. 73-270 requests the Supreme Court of Ohio to set aside a plan that was adopted by Order of this Court for 1972 and for the decennium, and to set aside the 1972 elections that were ordered by this Court; that this Temporary Restraining Order is necessary to prevent Messrs. Kerns and McElrory from drawing the state and federal judicial systems into conflict, to prevent relitigation of this cause in another forum and that this Order is authorized pursuant to 28 U.S.C. §§ 1651 and 2283 (1970); that, unless this Temporary Restraining Order is granted, the moving parties shall be required to move or plead in the Supreme Court of Ohio on or before May 1, 1973 in violation of the Order of this Court entered December 3, 1971; that, unless this Temporary Restraining Order is granted, the moving parties and the state and federal judicial systems will suffer grave and irreparable harm and damage, for which there is no adequate remedy at law.

Now, Therefore, It Is Ordered that Lloyd George Kerns, his agents, employees, and attorneys, and all persons acting by, under, for, or with him are enjoined to withdraw, dismiss, and terminate, on or before April 27, 1973, an original action filed in the Supreme Court of Ohio on March 30, 1973, captioned *Lloyd George Kerns* v. *John J. Gilligan, et al.*, Case No. 73-270, and that all parties to, and class members in, this cause be, and they hereby are, enjoined from proceeding further in Case No. 73-270 in the Supreme Court of Ohio or commencing or proceeding in any other action in any court designed to, or which will have the effect of, interfering with any order of this Court until further order of this Court.

It is further ordered that the hearing on the moving parties' motions under Rule 65(a), Federal Rules of Civil Procedure, shall be held on May 3, 1973, at 10:00 a.m., or as soon thereafter as the Court's docket permits.

It is further ordered that notice by telephone of this order on counsel for all parties shall be deemed sufficient notice.

Issued at 12:23 p.m., April 25, 1973.

No Bond is Required.

/s/ FRANK J. BATTISTI

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130 Y

Order

(Filed Mar. 16, 1972)

Before CELEBREZZE, Circuit Judge; BATTISTI, District Chief Judge; and WALINSKI, District Judge.

Pursuant to the December 22, 1971, Order of this Court, the plaintiffs were granted leave to examine the reapportionment plan and file objections thereto. The plaintiffs have filed their report containing no objections. Therefore, the reapportionment plan is adopted; and, accordingly, there is no compelling reason to retain jurisdiction.

It is so ordered.

/s/ ANTHONY J. CELEBREZZE
Anthony J. Celebrezze
United States Circuit Judge

/s/ FRANK J. BATTISTI
Frank J. Battisti
Chief Judge

/s/ NICHOLAS J. WALINSKI
Nicholas J. Walinski
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 71-1130 Y

Memorandum Opinion and Order

Before: CELEBREZZE, Circuit Judge; BATTISTI, District Chief Judge; and WALINSKI, District Judge.

This Court in its order of December 3, 1971, found that the apportionment plan adopted by the Board of Apportionment was unconstitutional on its face. This Court thereupon directed that the plan be resubmitted to the Board of Apportionment for the purpose of preparing and submitting a constitutionally sound plan to the Court by December 21, 1971. On December 22, 1971, this cause came on for hearing. A plan was submitted and evidence received.

On consideration of the evidence thus far in the case, the Court concludes that the Board of Apportionment, using the best available 1970 official census or census related data, has made a good faith effort to apply the one-man, one-vote doctrine in devising a plan for redistricting the General Assembly of the State of Ohio, and that the plan as presented to the Court on December 21, 1971, insofar as practicable, meets the one-man, one-vote standard required by the Constitution of the United States.

Therefore, it is concluded that the plan as presented to this Court meets the one-man, one-vote standard required by the Constitution of the United States.

In light of plaintiffs' motion seeking a reasonable time in which to further examine the entire plan submitted to plaintiffs and this Court this day, leave is granted to examine same, to file objections thereto, and to be prepared

to proceed not later than sixty days from the date of entry of this order.

Since time is of the essence in that the filing date for the primary election is February 2, 1972, and the Constitution of the State of Ohio requires that candidates be afforded a thirty-day period in which to change their residence prior to the filing date, the plan is adopted for the 1972 election of the Ohio General Assembly. See *Wells* v. *Rockefeller*, 394 U.S. 542, 547 (1969).

This Court retains jurisdiction over this matter.

IT IS SO ORDERED.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

/s/ NICHOLAS J. WALINSKI
District Judge